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JURISDICTIONAL STATEMENT

Respondents adopt Appellants' Jurisdictional Statement as set forth in Appellants' Opening Brief. **See Substitute Brief of Appellants ("Opening Brief," hereinafter) at p. 10.**

STATEMENT OF FACTS

Respondents desire to supplement appellants' Statement of Facts (**Opening Brief at 11-29**) pursuant to **Rule 84.04(f)**.

FACTUAL OVERVIEW

This case was tried on the basis of a twenty-two count Second Amended Petition

alleging claims against eleven defendants; there were two counterclaims. This case involves one partnership dispute, four alleged torts, a claimed oral joint venture, and a partition of real estate. This case - - the parties and the claims - - has been actively litigated since 1995.

The trial court "lived with" this case and these parties from June 1995 through January 2002. The same judge made every decision. The same judge conducted every hearing. The same judge heard all the evidence from all the witnesses. Appellants ask this Court to second-guess one of the State's finest trial judges, the Honorable David Shinn, who declared: "I think this is the most difficult case I have ever had. I honestly believe it is....and this - I think is the most convoluted..." **9/21-23/98, TR275:8-10, 18-19**.

Allan R. Carpenter ("Carpenter," hereinafter) was a licensed California real estate broker and attorney and a farmer and rancher. He gained his real estate development experience as counsel for developers/owners of the Golden Gateway Center and the Alcoa Building in San Francisco, California. **Vol. IV, TR621:12-623:3**.

Carpenter and his family identified the Block 105 in Kansas City as property they wanted to acquire and develop in a manner to complement Bartle Hall, the Kansas City Convention Center across the street. By 1985, Carpenter had acquired several individual parcels of land on Block 105 and assembled them into two tracts. **Vol. VI, TR670:2-671:16**. One tract, 427 W. 12th Street, on the northwest corner of 12th and Washington, had a serviceable office building on it but it is not involved in this appeal. **Vol. IV, TR629:13-630:3**. The other tract consisted of 51,741.65 square feet bounded by 12th Street on the North, Broadway on the east, the center line of Block 105 on the west, and with a southern border

about 3/4 of the way down the block toward 13th Street. **Vol. IV, TR 671:5-16**.

Carpenter met and befriended a young trial lawyer, Dale E. Fredericks ("Fredericks," hereinafter). Fredericks did some litigation work for Carpenter. In August 1985, Carpenter and Fredericks formed Missouri limited family partnerships, defendant The Carpenter 1985 Family Partnership, Ltd. and plaintiff Sangamon Associates, Ltd. Carpenter 1985's business was limited to the property at 12th and Broadway. **Vol. IV, TR623:25-624:8**. Carpenter hired independent counsel from Pillsbury, Madison and Sutro in San Francisco, to draft a Missouri limited partnership agreement regarding ownership of the property facing Broadway. **9/21-23/98, TR292:2-7**.

The limited partnership agreement:

- - named Carpenter 1985 the Managing General Partner. **Vol. IV, TR630:18-25**.
- - provided that each partner held its interest 99% as a limited partner and 1% as a general partner. **L.F. 210**.
- - acknowledged the capital contributions of the partners as 60% Carpenter 1985, 15% Edgar Carpenter (Allan's brother), and 25% Sangamon. **L.F. 211**.
- - granted holders of 75% of the partnership interest authority to sell the property. **Vol. IV, TR694:16-20**.
- - granted power to the Managing General Partner to control the partnership with very few restrictions. **L.F. 218;221**.
- - restricted partners other than the Managing General Partner from charging for their services. **L.F. 220-21**.

- - authorized only the Managing General Partner to the reimbursed for expenses associated with partnership business. **L.F. 220-21**.

- - recognized that Carpenter owned C-V and other properties and interest. **L.F. 223**.

The partnership name was Broadway-Washington Associated, Ltd. ("BWA," hereinafter).

BWA obtained a loan from Overland Park Savings and Loan to fund its efforts to develop the property. **Vol. I, TR54:1-55:13**. By 1988, the property had not yet been developed, the real estate market was bad, the surface parking lot operated on the property was producing about as much income per year as the Overland Park Savings and Loan debt was costing in interest per year. Due to economic conditions, the partners were concerned Overland Park was not interested in renewing the note when it came due in 1988. ***Id.*** To avoid a default by BWA and prevent additional capital calls, Carpenter agreed to purchase land from BWA equal in value of the Note owed, based on the BWA's acquisition cost. Sangamon and Edgar accepted this proposal and Carpenter bought 63.53% of BWA's property. **Vol. IV, TR721:1-723:14; TE10**. With the property came 63.53% of the parking lot receipts. ***Id.*** This arrangement allowed BWA to retain the remainder of the property free and clear.

Sangamon's claims in this lawsuit relate exclusively to BWA. Fredericks' claims, on the other hand, are partnership claims related to an alleged oral joint venture that he asserted was formed by the tenancy in common, and personal tort claims.

Sangamon claimed that Carpenter 1985 was "stripping cash" from BWA. What was happening was BWA was paying the percentage of parking lot receipts to Carpenter as agreed

in 1989. ***Id.*** In 1991, Carpenter was experiencing difficulties paying the entire debt service and asked BWA and Sangamon to buy back part of the property. **Vol. IV, TR64:10-65:3**. Sangamon would not buy the property under the terms of the BWA partnership agreement but Fredericks purchased 10% as a tenant in common using funds from his IRA. **Vol. IV, TR65:17-66:4**. The tenancy in common was a disaster because it gave Fredericks, the holder of a 10% interest, the right to control sale of the property that BWA Partnership Agreement placed in the majority owners. **9/21/-23-98 TR212:13-215:25** (Carpenter: agreed to tenancy in common because blinded by confidence in Fredericks as his lawyer). Fredericks had a minority interest in the partnership, a minority interest as a tenant in common in the property at 12th and Broadway, and he had no interest in the 427 W. 12th Street property. **Vol. IV, TR676:17-20**. This litigation followed Fredericks' refusal to sell the 10% interest.

(A) **THE PARTIES**

1. **Plaintiffs/Appellants**. Sangamon Associates, Ltd. ("Sangamon") is a Missouri limited partnership formed in 1985 for the specific and limited purpose of serving as a general and limited partner in Broadway-Washington Associates, Ltd. ("BWA"). Sanagamon is a family partnership in which the marital community of Dale E. Fredericks and Carol J. Fredericks is the managing general partner ("Fredericks Marital Property"). Dale E. Fredericks ("Fredericks") is an individual and the manager of Sangamon. Respondents adopt, with one caveat, appellants' description of themselves. **Opening Brief at 11.** The caveat is that the nature and bases of the causes of action and the issues on appeal as to "Sangamon" and "Fredericks" are quite distinct. Respondents endeavor to separate them as appropriate.

Appellants seem to conflate them most of the time.

2. **Defendants/Respondents.** The Carpenter 1985 Family Partnership, Ltd., a Missouri limited partnership ("Carpenter 1985"); Carpenter-Vulquartz Redevelopment Corporation, a Missouri redevelopment corporation ("C-V"); Allan R. Carpenter ("Carpenter"); The Marital Community of Allan R. Carpenter and Theodora D. Carpenter ("Carpenter Marital Community"); The Carpenter 427 W. 12th St. Family Partnership, Ltd., a Missouri limited partnership ("Carpenter 427"); Golden Gateway Building Co., a dissolved California limited partnership ("GGBC"); DuPage Properties, Inc., a dissolved Nevada corporation ("DuPage"); St. Francis Associates, L.P., a California limited partnership ("St. Francis"); Fleishhacker Properties, a California general partnership ("Fleishhacker Properties"), Mortimer Fleishhacker ("Fleishhacker"); and Broadway-Washington Associates, Ltd., a Missouri limited partnership ("BWA"). **L.F. 5-13; ¶3-13**.

3. **Deceased defendant, Allan R. Carpenter, for whom plaintiffs made no substitution.** Allan R. Carpenter died in November 2000. Defendants filed their Suggestion of Death of Allan Carpenter on January 30, 2001. **2nd Supp. L.F. 365**. Sangamon Associates and Dale Fredericks failed to move to substitute any party for the individual deceased defendant. Thus, appellants allowed their actions against Carpenter in Counts Three, Eight, Nine, Ten, Thirteen, Fourteen, Fifteen, Sixteen, Seventeen, Eighteen, Nineteen, Twenty, Twenty-One and Twenty-Two to lapse and terminate. **Rule 52.13(a)**. Appellants inaccurately refer to Allan Carpenter as a "Respondent" throughout their Brief. The Court should deny all allegations of error regarding the judgments in favor of Allan Carpenter on Counts Three,

Eight, Nine, Ten, Fourteen, Fifteen, Sixteen, Seventeen, Eighteen, Nineteen, Twenty, Twenty-One, and Twenty-Two. **L.F. 606-610**.

4. **Non-existent party "Golden Gateway Venture."** Fredericks alleged there was an oral joint venture called the "Golden Gateway Venture." **L.F. 92-98**. Fredericks testified there were no indicia or characteristics of a partnership: no capitalization; no registered agent; no partnership agreement; no certificate of limited partnership; no registration of fictitious name; no tax identification number; no tax returns; no K-1's; no shared profits; no joint bank accounts; no bank account at all; no partnership distributions; no shared expenses; and, no written indicia of any kind of a partnership. **7/15/98, TR601:19-615:16 (Fredericks); 4/15/99, TR9:8-9: (Judge Shinn: "Well there is no partnership that I found.")**.

The trial court properly granted judgment in favor of these defendants on Fredericks' conversion claim, as well as all of his other claims based on the non-existent alleged oral joint venture. **L.F. 606-610 Final Judgment; Counts Thirteen (accounting) L.F. 68-74; Fourteen (injunction) L.F. 74-79; Fifteen (breach of fiduciary duty) L.F. 79-85; Sixteen (receiver) L.F. 85-87; Seventeen (removal of manager) L.F. 87-92; Count Eighteen (conversion) L.F. 92-98; and Nineteen (constructive trust) L.F. 98-101**.

5. **Parties below omitted from Appellants' brief.** Appellants omit any reference to three defendants in the Argument section of their Brief: The Carpenter 427 W. 12th Street Family Partnership, Ltd., Mortimer Fleishhacker, and The Marital Community of Allan R. Carpenter and Theodora D. Carpenter (which ceased to exist on Allan Carpenter's death). **Opening Brief, *passim*.** As a result of these omissions, the Court may affirm the judgments

in favor of Carpenter 427 on Count Twenty, Twenty-One, and Twenty-Two. **L.F. 610**. The Court may affirm the judgments in favor of Mortimer Fleishhacker on Counts Nine, Ten, Twelve, Fourteen, Fifteen, Sixteen, Seventeen, Eighteen, Nineteen, Twenty, Twenty-One and Twenty-Two. **L.F. 606-10**. The Court may affirm the judgments in favor of the Marital Community on Counts Eight, Nine, Ten, Twelve, Fourteen, Fifteen, Sixteen, Seventeen, Eighteen, Nineteen, Twenty, Twenty-One, and Twenty-Two. **L.F. 606-10**.

Appellants only use the names of four other defendants one place, footnote 1 on page 11-12 of their Brief. They cite no record facts proving, or even relating to, the alleged liability of these entities: Golden Gateway Building Company, DuPage Properties, Inc., St. Francis Associates, L.P., Fleishhacker Properties. The Court may find that appellants have abandoned any claim of error regarding each of these parties, if there were any. The Court may affirm the judgements in their favor on Counts Nine, Ten, Twelve, Fourteen, Fifteen, Sixteen, Seventeen, Eighteen, Nineteen, Twenty, Twenty-One, and Twenty-Two. **L.F. 607-10**.

Sangamon never sued Edgar Carpenter - - the third partner of BWA during most of the relevant time - - and he is not mentioned in appellants' Brief.

6. **Counterclaim plaintiff in Partition.** Theodora D. Carpenter is the plaintiff and respondent on the partition counterclaim. She was never a defendant. Upon Allan Carpenter's death, Theodora Carpenter moved to substitute herself as plaintiff in the partition action. The trial court entered its order granting her motion and substituting Theodora for Allan as plaintiff in the partition claim only on September 26, 2001. **1st Supp. L.F. 131**.

7. **Counterclaim defendants in Partition.** Carpenter named Fredericks, individually;

Fredericks as Manager of Marital Community of Dale E. Fredericks and Carol J. Fredericks; and Oppenheimer & Co., Inc. as Trustee of the Dale E. Fredericks IRA Rollover Account No. 324-14957-1-6 as partition defendants. **L.F. 176-77, ¶2-4**. The trial court dismissed Oppenheimer as an unnecessary "trustee" of the IRA rather than an "owner." **1st Supp. L.F. 127-130**. No party appeals that decision and it may be affirmed. The trial court omitted reference to the Fredericks Marital Community in the final judgment of partition but no party appeals.

B. **THE DISMISSED COUNTERCLAIM FOR JUDICIAL SUPERVISION IS IRRELEVANT.** The counterclaim for judicial supervision of the winding up of the Broadway-Washington Associates, Ltd. partnership was voluntarily dismissed without prejudice in open court on April 15, 1999, with Sangamon's and Fredericks' consent and is not appealed. **L.F. 180-235; 4/19/99, TR33**. Appellants' counsel stated, "We would gladly accept dismissal of the winding up count." **3/19/99, TR19:9-10**. This claim would have required judicial approval of the Managing General Partner's decisions to pay BWA's lawful debts, such as the accrued debts owed to C-V that the Managing General Partner compromised through the consent judgment about which Sangamon bitterly complains. There is no requirement for Sangamon's approval or participation in decisions to pay BWA's debts in the partnership agreement. That authority is vested in Carpenter 1985, both as managing general partner and as the winding up partner.

C. **APPELLANTS' BRIEF CONTAINS MATERIAL RECORD ERRORS.** Through mischaracterizations and errors, appellants misstate various aspects of the

record. This section contains the most material facts as stated by appellants and respondents' corrections that are not otherwise contained in respondents' brief.

1. **No exclusion from partnership books and records.** Carpenter testified extensively about the reasons that Carpenter 1985 did not provide sensitive documents to Sangamon after April 19, 1994, the date on which Fredericks inserted an arbitration clause in a purchase agreement he was drafting for BWA so that Sangamon's demand for an extra $2.5 million from the sale proceeds would have to be resolved through arbitration against Carpenter 1985's express wishes: e.g., **Vol. IV, TR689:19-690:16** (Fredericks acting unreasonable since April); **TR689:19-690:3** (believed Fredericks had the documents); **TR694:4-20** (Fredericks' improperly injecting himself into negotiations he did not have a right to control and with which he was interfering); **TR699:7-21** (same); **TR702:9-18** (same); **TR703:5-704:7** (no need to give information that is not a real offer to purchase). The trial court rejected Sangamon's claim that it was unlawfully excluded from partnership documents, which formed part of the basis for the accounting claims in Count One and Count Seven and the breach of contract claim in Count Four. Sangamon did not appeal these judgments.

2. **Accounting method change not deceptive.** Appellants state Callahan [BWA's CPA] "utilized the accrual method [of accounting] because 'the attorneys in Kansas City wanted an accrual financial statement (referring to Carpenter's attorneys). **See Opening Brief at 20-21, n 3. 7/17/98; TR970:18-971:19.** Callahan testified there were "two reasons." "First of all, when I started to do the work, I did not get very far into it at all until I realized that to have a realistic statement - make them realistic, understandable - an accrual method of accounting

was necessary because the accrual method and the cash method would be drastically different." **7/17/98, TR971:2-8**. He had already made that decision before he heard what the attorneys wanted. **TR971:9-19**.

3. **Payment not disguised.** At page 21, appellants state: "He [Carpenter] disguised the 1993 cash rent payments by not mentioning them on the partnership's 1993 tax return." Appellants do not provide a specific transcript citation. Carpenter testified about the 1993 return on examination by appellants' counsel on **7/16/98 at TR727:21-730:10**. On re-cross, counsel elicited this testimony from Carpenter:

Q. Cofran: You did that purposefully, didn't you?

(B) No.

(17) Why - -

(1) I didn't even know until you raised it today what year they were in.

(17) How could you miss expenditures as large as $19,300?

(1) It's not hard. I file at least 23 tax returns, and when my accountant or my daughter or somebody says: 'This is okay. Sign it,' as far as I'm concerned, I don't second-guess them."

Id. There is no evidence of purposeful deception by Carpenter or anyone else.

D. **PROCEDURAL OVERVIEW**

1. **Trial.** Plaintiffs persuaded the trial court to permit them to try their breach of fiduciary duty claims contemporaneously with trial of their accounting claims. The court began trial of Fredericks' tort-based jury issues and the judge-tried issues on August 19, 1997.

Plaintiffs sought and received an unusual hiatus in the trial from midday Friday, August 22, 1997, until Tuesday, September 2, 1997. **Vol. V, 8/22/97, TR897:11-12**. The purpose of the hiatus was to permit plaintiffs to resolve the defects preventing admission into evidence of certain depositions, to bring live witnesses from California on Fredericks' tort claims and to marshal their remaining evidence. "As we told the Court at the beginning of the trial, we anticipated that we had, you know, about two weeks worth of evidence. We've tightened it up so that we think we have only two more days of evidence. These are live witnesses traveling here from California who will testify on issues of proximate cause and reputation and several other items. I haven't got all my examination fleshed out yet. They couldn't be here this week. They were planning on coming next week." Friday, 8/22/97 10:00 a.m. **Vol. V, TR847:17-850:0**.

After eleven days of trial, Fredericks returned to court, made offers of proof of the previously rejected depositions and rested; no live witnesses appeared. **Vol. VI, TR1061:24**. Defendants moved for a directed verdict on Fredericks' jury issues and the court granted it. **Vol. VI, TR1062:24-1071:10**.

2. **Non-jury issues.** Plaintiffs argued, like they do here, that the breach of fiduciary duty claim is a jury issue. **Vol. V, TR873:8-9; Opening Brief at 58**. Before the trial court, unlike here, they candidly admitted that there is no reported Missouri decision suggesting that a breach of fiduciary duty claim may be tried to the jury. **Vol. V, TR874:20-24**. The comment to **Restatement of Torts (Second) §874**, on which appellants rely, expressly states: "The local rules of procedure, the type of relation between the parties and the intricacy of the transaction

involved, determine whether the beneficiary is entitled to redress at law or in equity." ***Id.*** Partnership fiduciary duty actions are tried to the court in Missouri. The trial court determined it is an issue for the court and did not direct a verdict on the breach of fiduciary duty claims. **Vol. V, TR882:5-883-22**. Further, plaintiffs voluntarily waived their claimed right to a jury trial on their breach of fiduciary duty claims and conversion claims on the record. ***Id.*****; Vol. V, TR972:15-973:15**.

3. **Appellants argue issues not tried.**

a. **Accrued but Unpaid Expenses.** The Second Amended Petition does not contain any allegations related to "accrued" but unpaid expenses. **L.F. 1-128**. Sangamon's complaint was that cash had been paid out by BWA, not that debts had been incurred but unpaid. Sangamon never amended its Second Amended Petition to make any allegations about the accrued but unpaid expenses. After permitting the evidence over objection, the trial court concluded and ultimately expressly ruled that the accrued but unpaid expenses were not before the court because they were outside the scope of the pleadings. **12/21/99, TR132:8 (Judge Shinn: "So the claimed accruals. And that impacts on this case how?") (Smiley "Well, it doesn't your Honor, because that is the claim that was outside the scope of the pleadings."); TR133:8-17 (Judge Shinn: "I don't think they have any bearing on anything that we are talking about."); 4/13/2000, TR63:8-64:15**. Sangamon does not challenge this ruling on appeal.

Sangamon nonetheless inexplicably devotes four pages of its Brief to the excluded issue of accrued but unpaid expenses in connection with the allegedly "secret judgment."

Opening Brief at 19-23. Respondents will briefly outline the facts because they help to explain why the trial court found that there was no breach of any fiduciary duty on the issues and evidence before it and no need for a receiver.

In 1993 and 1994, the Managing General Partner of BWA (The Carpenter 1985 Family Partnership, Ltd.) authorized BWA to pay, and it did pay, part of the office rent and services fees due to C-V. Sangamon did not contest the propriety of BWA paying $24,000.00 in office rent to C-V for 1985 and 1986 (**7/13/98, TR103:17-23; 12/21/99, TR80:16-19**), as contemplated in the "First Year Budget" attached to the Management Agreement entered into between C-V and BWA. **7/13/98, TR100:4-11**. The trial court did not believe Fredericks' testimony that the Management Contract between BWA and C-V was orally modified so that BWA's office rent owed to C-V was reduced from $18,000.00 per year to $6,000.00 per year. **12/21/99, TR87:5-19 ("the only testimony on that is from Mr. Fredericks that there was an oral agreement. I'm going to disallow the office rent claim.")**. After trial, Sangamon expressly dropped its complaint about money paid out to C-V for tax preparation expenses. **12/21/99, TR93:3-21 (Cofran: "There is no claim on that one.")**. The court expressly found that BWA's payment of $7,600.00 C-V for office support services, pursuant to the contract, was not excessive. **12/21/99, TR92:25-93:2**.

These payments were first made beginning in 1993 when BWA had available cash with which to pay them. C-V had agreed to deferred payment rather than force BWA to make capital calls. **7/16/98, TR720:17-721:19; 723:13-724:16**. Fredericks testified on behalf of Sangamon that the C-V employee who did the work (Elizabeth Carpenter Huey) should be paid.

Vol. III, TR557:22-23 (Fredericks: "If Beth has been doing this work and hasn't been paid, she should be paid.").

The unpaid bills from C-V for rent and services were not reflected in any of the cash-basis accounts precisely because they had not been paid. The BWA partnership agreement required only that the accounts to be maintained on a "cash basis." As Sangamon admits, when the litigation began and the partnership needed to prepare for dissolution and winding up, the accountant prepared "accrual" based compilations that reflected debts owed by the partnership that cannot be reflected in cash basis reports. **7/15/98, TR717:20-713:17**. Sangamon was aware of the deferral and that payment was eventually expected. **7/16/98, TR767:22-771:15**.

b. **Alleged sale of partnership property at a loss.** Another issue that was expressly excluded from the trial but that is in Appellants' Brief is an allegation that BWA was somehow forced to sell some property to Allan Carpenter at a loss due to Carpenter's fiduciary position. **Opening Brief at 28.** The issue was not pleaded in the Second Amended Petition. **L.F. 1-128**. Defendants promptly objected to any evidence relating to this allegation because it too was outside the scope of the pleadings. **7/13/98, TR26:6-32:25 (objection overruled at this time but continuing objection permitted); TR158:6-21 (objection renewed); TR218:3-5 (objection renewed).** The trial court heard the evidence over objection, found the issue had not been tried by consent and ultimately ruled that this alleged loss was outside the scope of the pleadings. Sangamon eventually moved to amend its pleadings to include this claim but the court denied leave. **12/21/99, TR61:24-62:23**. Sangamon does not challenge this ruling on appeal.

4. **No findings of fact and conclusions of law.** The trial court properly did not enter findings of fact and conclusions of law on the court-tried issues. Appellants failed to request findings of fact and conclusions of law on the record before introduction of the evidence, as required by **Rule 73.01(c). 9/22/98, TR23:2-23:5**. Respondents did make a timely request for findings of fact and conclusions of law but waived their request after the court entered the interlocutory judgment consistent with earlier rulings and primarily finding in their favor. **L.F. 496-502, January 14, 2000.**

5. **Partition Action.** Appellants' summary of the evolution of the partition action below is of little aid to the Court in understanding the trial court's disposition or the issues on this appeal. The Court of Appeals noted that the context in which the partition action took place is critical to an analysis of the trial court's result. **Opinion at 7.** Therefore, respondents will detail these factual matters at the relevant point in their argument, ***infra*, pp. 28-33**.

6. **There are judgments on nine claims that are not appealed.** Of the twenty-two counts, the judgments as to nine of those claims have become final judgments. They are set forth below:

a. Count One - Accounting: Sangamon Associates sued the Carpenter 1985 Family Partnership, Ltd. and Carpenter-Vulquartz for an accounting. **L.F. 27-30**. The trial court entered judgment in favor of defendants. **L.F. 605**. Sangamon did not allege error in this judgment, and admitted at trial that it had effectively received an accounting. **TR210:12-22**.

b. Count Two - Documents: The court entered judgment in favor of Sangamon & Associates confirming the obligation of the Managing General Partner to continue to make

records available to Sangamon. **L.F. 30-32; L.F. 605-606**. Defendant did not appeal this judgment.

c. Count Four - Breach of Contract: Sangamon Associates sued The Carpenter 1985 Family Partnership, Ltd. for breach of contract by (1) failing to hold periodic meetings of the partners; (2) failing to keep and maintain a complete set of books and records accurately reflecting the business transactions of the partnership; (3) failing to provide Sangamon access to the books and records; and (4) failing to faithfully manage the affairs of the partnership. The trial court entered judgment for defendant. **L.F. 606, 204**. Sangamon did not allege error in this judgment.

d. Count Six - Removal of Managing General Partner and Manager of Project: Sangamon asserted this claim against Carpenter 1985 and C-V. **L.F. 40-44**. No Point Relied On claims error in the court's entry of judgment in favor of defendants on Count Six. See also discussion of Count Seventeen, below.

e. Count Seven - Derivative Accounting: Sangamon sued Carpenter 1985 and C-V derivatively for an accounting allegedly on behalf of BWA. **L.F. 44-47**. The trial court entered judgment in favor of C-V. **L.F. 606**. Sangamon did not allege error in this judgment. The Court also entered judgment in favor of Sangamon Associates, Ltd. derivatively on behalf of BWA and against Carpenter 1985 for reimbursement of $65,694.00 in expenses paid out by BWA for a townhouse rented in Kansas City. **L.F. 606-607**. Carpenter 1985 and BWA did not appeal this judgment.

f. Count Twelve - Derivative Removal of Managing General Partner and Manager of

Projects. Sangamon sued derivatively on behalf of BWA for removal of Carpenter 1985 as Managing General Partner and C-V as Manager of Projects. **L.F. 64-68**. The trial court entered judgment in favor of defendants. **L.F. 607-608**. Sangamon does not allege error in that judgment in any Point Relied On.

g. Count Thirteen - Oral Joint Venture Accounting: Fredericks sued Golden Gateway, DuPage, St. Francis, Fleishhakcer Properties, Carptner and Fleishhacker for an accounting of the alleged oral joint venture (partnership). **L.F. 68-74**. The trial court *sua sponte* amended the pleadings to name BWA as the sole defendant in Count Thirteen and deleted all of the original defendants. **L.F. 608**. Fredericks did not object. This amendment changed the basis on which Fredericks sought the accounting. Fredericks' original claim was based only on the rejected oral joint venture. The court's decision was based on the uncontested finding that 10% of the parking revenues for the former tenancy in common were retained by BWA. **7/14/98 TR258:1-21.** (This evidence directly contradicted the pretrial affidavit of Sangamon's expert that was used to support one of the numerous requests for a receiver over BWA.) ***Id*. 256:10-258:21.** BWA did not appeal this judgment notwithstanding its unconventional procedural nature. Fredericks did not allege error in this judgment. Defendants did not appeal it either, because the effect of the judgment was *de minimus*.

ARGUMENT IN RESPONSE TO POINT RELIED ON
I

A. The Trial Court Did Not Err In Granting Partition By Sale Of The Former Tenancy In Common Because The Trial Court Followed Rule 96, Conducted A Fair Public Sale, And Sold The Property To The Highest Bidder.

This section of the instant Brief responds to the argument set forth under the heading of Appellants' First Point Relied On. **See Appellant's Opening Brief at pp. 33 - 43.**

***Standard of Review and Procedural Defect*.**

Carpenter's counterclaim for partition of land (**L.F. 175-180**) was tried to the court. The judgment of the trial court will be affirmed unless there is no substantial evidence to

support it, it is against the weight of the evidence, it erroneously applies the law or it erroneously declares the law. ***Murphy v. Carron*, 536 S.W.2d. 30 (Mo. 1976)**. Fredericks argues that (1) the trial court erroneously applied **Rule 96, Opening Brief at 30, Point Relied on I.A.**; (2) the trial court's action failed in some non-specified manner to comply with **§528.010, RSMo., Opening Brief at 17, Point Relied On I.A.**; and (3) Carpenter's "unclean hands" precluded partition, **Opening Brief at 30, Point Relied On I.B.**

Neither of Fredericks' subparts of Point I alleges that Fredericks was prejudiced by the trial court's ruling or judgment, and he fails to show any prejudice in the argument offered in support of his First Point Relied On. **Opening Brief at pp. 33-43.** A party may only appeal a judgment that operates directly and prejudicially on his personal or property rights or interests. ***Horace Mann Ins. Co. v. Riley*, 716 S.W.2d 820 (Mo. App., W.D., 1986); §512.020, RSMo.** (must be aggrieved to appeal). This Court may not reverse, even for properly preserved trial error, that does not materially affect the action. **§512.160.2, RSMo.** As this Court is aware, it is the appellants' duty to "distinctly point out the alleged errors of a trial court and to show that he was prejudiced by the rulings alleged to be erroneous." ***Jacobs v. Stone*, 299 S.W.2d 438, 440 (Mo. 1957).** Where, as here, no prejudice is shown (or, apart from a series of rhetorical questions appearing at pages 39-40 of the Opening Brief, even attempted to be shown), this Court need not consider the claimed error further. ***Reynolds v. Arnold*, 443 S.W.2d 793, 799 (Mo. 1969).** Therefore, this Court should disregard Point I of this appeal *in toto.*

Indeed, rather than prejudicing or harming Fredericks, every act by the trial court complained of herein benefited Fredericks at the expense of the 90% owner of the land. The lack of prejudice is demonstrated by the relief now requested. Fredericks still asks this Court to remand for a private sale supervised by the trial court, not a new partition sale. **Opening Brief at 54-55.**

FACTUAL CONTEXT OF TRIAL COURT'S ACTIONS

If the Court considers Point I, the fundamental basis of Frederick's complaint is that the trial court permitted the winning bidder at a lawfully conducted judicial sale to unilaterally increase his bid 10-fold, to alleviate the trial court's concern that the winning bid was too low. **L.F. 551-61.** Carpenter's Supplemental Suggestions in Support of Final Order of Partition, 10/11/01, sets forth Carpenter's offer, why it is fair and complies with statute. **L.F. 557-583.** The 10-fold increase in the bid satisfied the trial court's conscience, so it confirmed the sale at the increased price. By permitting the unilateral increase, by the only bidder, the Court kept the holder of a *de minimus* interest (10%) of a tenancy in common from continuing to block partition and increase the costs to the partitioning co-tenant. **4/15/99, TR24:14-15 (Judge Shinn: "You know, he has a diminimus [sic] interest. He has a ten percent interest.")**

Although he claims there was a "private sale," Fredericks finally admits that the Court "reinstated" the prior "sheriff's sale" **Opening Brief at 35**. Fredericks claims to have objected to that procedure, but his citations to the Legal File do not address propriety of reinstating the prior sale and confirming it at a higher price. **Opening Brief at 35 (citing L.F. 508-19).** Fredericks was still asking the Court to order a private sale through a receiver. **L.F.**

543-44. At bottom, he waived any objection to a mere unilateral increase in the price offered by the winning bidder.

As the Court of Appeals recognized, the actions and decisions of the trial court in connection with the partition action should and must be considered in context. **Opinion at 7.** The trial court and partitioning counsel understood that it was "not the usual partition case." **9/22/98, TR139:10-11**. The partition property at first sold at public auction to the highest and only bidder for the price of One Hundred Thousand Dollars ($100,000.00). **L.F. 375; 377; 491, ¶1, 1/14/00, L.F. 375**, **Report of Sale.** The trial court expressly ruled "there are no facts presented to the Court that show any failure of partitioning counsel to have the partition sale lawfully conducted." **L.F. 491, ¶1**. More than one potential bidder attended the sale. **L.F. 379, n.1.** Fredericks was represented at the sale but did not bid at the sale. **L.F. 491-92, ¶1.** Fredericks never claimed he was prevented from bidding at the sale and never offered to bid if the court ordered a new public sale. Fredericks hired a court reporter to record the sale proceedings. The transcript is at **L.F. 435-441**. The only reason the trial judge refused to confirm the judicial sale was because he believed the price was too low. **L.F. 491, ¶1.**

In his reply to the partition counterclaim, Fredericks claimed to be without information and so denied that the property had to be partitioned by sale because it could not be partitioned in kind without great prejudice to the parties. **L.F. 179, ¶26, counterclaim; L.F. 241, ¶26, reply.** In September 1998, Fredericks took the position that - - "Our position is, it should be sold through normal commercial means. That is through - - technically, through a commissioner. We agree there should be partitioned by sale as opposed to partitioned in

kind." **9/21/98, TR5:6-19 (Cofran, trial counsel).** And "[I]t is simply a matter of sale and whether it should be on the courthouse steps or through a commissioner using a commercial means." **9/22/98, TR112:7-21 (Cofran).** Fredericks always only wanted both parcels sold together. "Your Honor, it has always been our position that the two properties should be sold together because it will fetch more money." **9/23/98, TR178:3-5 (Cofran).**

Only after the lawfully conducted public sale, Fredericks changed his position and claimed that the property could be partitioned "in kind" without great prejudice. **L.F. 514-519** (December 20, 1999). Carpenter still did not think partition in kind was feasible. The trial court ordered it anyway, on January 14, 2000. **L.F. 493**.

The court found that "the dynamics concerning a judicial sale have so changed since initially ordered on April 15, 1999 [**L.F. 368-72**] that it is improvident to dispose of this parcel of property by a judicial sale." **L.F. 492, ¶3.** The court then found that "partition in kind of this real property may be done without great prejudice to the parties in interest. Rule 96.01." **L.F. 492-93, ¶3.** The court ordered the appointment of commissioners to partition the real property in kind. **L.F. 493, ¶5-8; Rules 96.12, 96.13, 96.15, 96.16.**

After four months of inactivity, Carpenter moved the court to actually appoint the commissioners it ordered in January. **L.F. 504-07, 5/17/01**. Fredericks then changed his position again, this time, back to opposing partition in kind. **L.F. 508-22; 540-46**. Rather than seeking a new judicial sale, Fredericks again sought appointment of a receiver to sell the partition property, but still only if it were sold *along with* BWA's partnership property. **L.F. 510-11** (June 11, 2001) **L.F. 523-39** (August 17, 2001); **L.F. 540-546** (September 26, 2001).

The trial court encouraged the parties to settle their disputes. On August 17, 2001, the court held a status conference in chambers with all counsel present and served as a settlement judge with the consent of all. **L.F. 548**. On September 21, 2001, the court held another settlement-oriented status conference with all counsel in chambers. **L.F. 548**.

To terminate the expensive limbo in which the purchaser at the lawfully conducted judicial sale found himself, Carpenter unilaterally offered to increase his bid from $100,000.00 to $1,051, 916.80 (One Million Fifty-One Thousand Nine Hundred Sixteen Dollars and Eighty Cents), amounting to about $32/square foot, and consisting of $105,251.68 in cash and Carpenter's 90% interest in the property. **L.F. 557-61, ¶11-15, 10/11/01**. This amount was consistent with private "offers" from others, e.g., DST $34/sq. ft. with 6% commission. **TR243:10-244:15; 245;12-246:11; 475:4-476:15; 477:6-479:1**. The trial court at first set aside its April 15, 1999 Interlocutory Order of Partition and Sale (**L.F. 368-71**) on January 14, 2000, but later reinstated the April 15, 1999 Order of Partition and Sale, accepted the increased bid from the winning bidder, and confirmed the sale at the higher amount. **L.F. 612-13, 1/11/02**. The court considered the record, as well as "numerous and extensive briefs and arguments of the parties." **L.F. 612**. There was no "private sale."

The court ordered payment of $4,200.60 in costs from the cash proceeds of $105,251.68, but accepted "Carpenter's proposal not to require an award in this final judgment for the statutory legal fees and other costs incurred in obtaining this partition; provided, however, that if Fredericks appeals this final judgment of partition, Carpenter remains free to seek full compensation from the Court of Appeals based upon the record presented in this

Court." **L.F. 613, ¶6**. Carpenter requested attorneys fees and costs in the amount of $231,305.00 for lawfully conducting the judicial sale of a million dollar property over a six year period against intractable opposition. **Respondents' App. 4-8; 12/21/99, TR43:5-44:6**.

The Trial Court Honored the Essential Requirements of Rule 96 and Any Technical Irregularities Benefited Appellants.

Here, the trial court ordered partition by sale, conducted a lawful sale on the courthouse steps and sold the property to the highest bidder. The only anomaly in the procedure is that the court permitted the highest bidder to unilaterally increase his bid 10-fold after the sale because the court thought the original sale price was too low.

The trial court retains jurisdiction over all of its interlocutory orders, including the order setting the sale and the order setting it aside. "[A] judgment for partition and an order of sale are interlocutory." ***Heintz v. Hudkins*, 824 SW.2d 139, 144 (Mo. App., S.D., 1992); see *Hiatt v. Hiatt*, 188 S.W.2d 863, 895 (Mo. App., S.D., 1945).** Thus, Judge Shinn retained jurisdiction to modify his judgment of partition at any time prior to entry of the final judgment. ***Heintz*, 824 S.W.2d at 144; see *Lee's Summit Building & Loan Association v. Cross*, 134 S.W.2d 19, 22-23 (Mo. 1939).** Where the partition is by sale, the trial court's judgment becomes final only after the court confirms the sale of the property and orders the proceeds to be disbursed. ***Lester v. Tyler*, 69 S.W.2d 633, 638 (Mo. 1934).** Thus, there is no question that the trial could had continuing authority to act as it did.

In taking issue with the trial court's action, Fredericks essentially asserts that any

technical deviation from partition procedure requires reversal of the judgment entered on a partition sale. In so arguing, he relies primarily upon **Rule 96** and ***Darrington v. George,* 982 S.W.2d. 823 (Mo. App., W.D., 1998).** Carpenter relied on and thoroughly briefed ***Darrington*** before the trial court. **L.F. 548-55.** Fredericks correctly notes that there are two methods to partition property: by sale or in-kind. He also correctly notes that if the property cannot be partitioned in kind without great prejudice to the parties' interests, it must be sold at public auction. **Opening Brief at 35-37; see §528.590, RSMo.; Rules 96.01, 96.11; *Vickers v. Vickers,* 762 S.W.2d 482 (Mo. App., E.D., 1988).**

The Western District Court of Appeals held in ***Darrington*** that a trial court may not order the parties to sell the property through a private commercial sale pursuant to the partition statute. ***Id*. at 824**. Yet, Fredericks had asked that trial court to do exactly that and continues to ask this Court to order a private sale through a receiver rather than a judicial sale. **Opening Brief at 43.** Nonetheless, the trial court here did not order a private sale or violate the instruction of ***Darrington*** or **Rule 96**.

Before the trial court, Frederick's position on whether the property subject to sale could or should be partitioned in kind shifted with the winds, as described above. Also as described above, his only real complaint about the sale that actually occurred is that the price was too low. Proper notice was given of the sale; multiple bidders (including a representative of Fredericks) attended the sale; Fredericks - - who did not bid at the sale - - did not contend before the trial court (and does not contend now) that he was prevented from attending or

bidding at the sale, or that anyone else was barred from attending or bidding at the sale. At the conclusion of this public sale, the highest and best bid was from Carpenter. Ultimately, as confirmed by the trial court, the property was sold to the bidder at the public sale that placed the highest and best bid - - Carpenter. And in confirming the sale, the trial court addressed the one real complaint Fredericks had with the result of the sale: that the price was too low. The single deviation from - - the sole addition to - - the procedures specified is the increase in the amount of the highest and best bid by the same bidder, which both directly benefited Fredericks and assuaged his only complaint about the sale.

A technical irregularity in a partition sale that does not materially prejudice the parties to the sale will not affect the validity or the sale or require reversal of judgment entered on the sale. ***Koester v. Koester*, 543 S.W.2d 51, 54 (Mo. App., E.D., 1976).** Even a "host of irregularities" may be overlooked if they are not shown in the aggregate both to be substantial and materially prejudicial to the rights of the parties to the sale. ***Parks v. Rapp*, 907 S.W.2d 286, 290-92 (Mo. App., W.D., 1995) (sale advertised as for cash, but made on terms; closing date extended; sale closed without payment of required purchase price; delay in closing caused lost crop rent; no substantial deviation found that materially prejudiced parties).** Courts have refused to find a substantial irregularity in sale where the deviation from procedure resulted in a lower sale price, again where the party challenging the validity of the sale was not prejudiced by the modified procedure. ***Forney v. Forney*, 926 S.W.2d 889, 890-91 (Mo. App., E.D., 1996).**

The sole deviation from the procedure authorized and contemplated by **Rule 96** in this

matter is a technical irregularity only, like those before the Courts of Appeals in ***Forney*** and ***Parks***. The Court of Appeals concluded as much on its review of the record herein, noting that Fredericks had not demonstrated any prejudice occasioned by confirming the sale at a significantly higher price. **Opinion at 6-9.** This Court should reach the same conclusion.

Respondents note that Fredericks attempts to posture his complaint about the sale price as implicating fundamental rights of due process. **Opening Brief at 37, 39-40.** Fredericks had all the procedural protections to which he was entitled under **Rule 96**. The sale was advertised; the sale was public; the property was sold to the high bidder. Fredericks' property rights were safeguarded by the trial court, and his single complaint (and the trial court's single, initial concern) about the sale - - that the price was too low - - was remedied. Rather than condemned, Judge Shinn should be commended for his creative resolution of the difficulty created by the failure of the public sale to draw higher bids.

Respondents' Request for Attorneys Fees

The Court of Appeals also ruled in ***Darrington*** that the trial court may not order the Court Clerk to distribute the private sale proceeds for real estate agent's fees, attorneys' fees, sheriff's fees and court costs and taxes. ***Darrington*, 182 S.W.2d at 825.** The trial court here only ordered the clerk to distribute the public sale proceeds as follows:

$535.00	Court Administrator's Commission	**Respondents' App. 2**.
$3,288.60	Publication Costs	**L.F. 373**.
$27.00	Recording of Levy	**L.F. 373, 375**.

$250.00 Certificate of Ownership **Respondents' App. 2**.

Carpenter offered to forego an award of attorneys' fees if Fredericks did not appeal. The fees, costs and expenses expended to the date of the Final Order and Judgment of Partition were $231,305.00. They were presented to the Court in a pleading certified by counsel. **Respondents' App. 1-12, ¶¶6-8, p. 4-8. 12/21/99; TR149:3-166:18.** This Court is an expert on attorneys' fees and may make an award of attorneys' fees, costs and expenses out of the proceeds based on this record. **L.F. 613.** The remaining funds would be distributable to Dale E. Fredericks' IRA.

B. Appellants' Undeveloped Reference to §528.010, RSMo., is Inapposite to Any Issue Regarding This Partition In That §528.010, RSMo., Only Applies To Partition Of Future Interests, Fredericks' Interest Was that of a Tenant In Common.

Fredericks' Opening Brief suggests that the trial court's action with regard to the partition sale somehow contravenes **§528.010, RSMo. <u>See</u> Opening Brief, Point Relied On IA.** He completely fails to develop his suggestion in this argument. Thus, this Court need not consider it. ***Brandt v. Pelican*, 856 S.W.2d 658 (Mo. 1993).**

If the Court determines to consider this suggestion anyway, respondents note that by its own terms, **§528.010, RSMo.,** only grants a right of partition to the current holder of an interest in land as against a future interest holder. The cases emphasize that this section of the partition statutes deals with life estates and other contingent or future property interests. **<u>See, e.g.,</u> *Smith v. Smith*, 600 S.W.2d 666 (Mo. App., W.D., 1980).** Fredericks' had a present

interest as a tenant in common. His reference to the statute, therefore, is completely inapposite.

C. The Right To Partition Of Land By Tenants In Common Is Not Constrained By The Doctrine Of Unclean Hands But, Even If It Were, The Trial Court Did Not Err In Granting Partition Because Fredericks Failed To Plead The Theory Of Unclean Hands On Which He Relies On Appeal And There Is No Credible Evidence That Carpenter Had Unclean Hands.

Fredericks replied to Carpenter's Petition for Partition of land with a Fourth Affirmative Defense based on "unclean hands." **L.F. 241-42.** The allegations supposedly amounting to "unclean hands" in the Reply had nothing to do with the theory advanced on appeal: that Carpenter acted in bad faith with regard to the partition action or sale. **Opening Brief at 40-42.** The pleaded defense primarily related to revenue matters. **L.F. at 241-42.** Fredericks also attempted to change theories at trial but Carpenter timely objected that this theory was outside the scope of the pleadings and the objection was sustained. **TR458-60.** The trial court properly rejected this late-blooming contention that respondents had "unclean hands," even if such a defense were applicable to partition actions. Likewise, the Court of Appeals recognized that the version of this defense asserted below had no connection with or to the action for partition. **Opinion at 10-11.**

If this Court should determine to consider today's incarnation of Fredericks' "unclean hands" defense, the trial court's judgment should nonetheless be affirmed. The right to

partition granted to tenants in common admittedly grew out of equitable principles, but it is a right of land ownership now, not equitable discretion. After nearly one hundred years there is not a single judicial decision stating, or even implying, that a tenant in common will be bound to his co-tenant in perpetuity if there is an allegation of "unclean hands" by the tenant seeking partition. Indeed, none of the authorities marshalled by appellants in "support" of this proposition hold or suggest that "unclean hands" is a defense to an action for partition. **Opening Brief at p. 41** (collecting cases). Nor is this particularly surprising, in that the rule urged on this Court by Fredericks would effectively terminate the viability of joint ownership of property. No one would risk a joint tenancy or tenancy in common as a form of ownership knowing that, if the relationship between the tenants soured, the land would be forever held jointly.

Without regard to the lack of authority for Fredericks' position or the lack of record support for his allegation of unclean hands, respondents note that the record contains substantial evidence that Carpenter did not have "unclean hands." Carpenter filed his Petition for Partition of Land in April 1996. **L.F. 175-80, 1963.** The trial court entered final judgment on January 11, 2002. **L.F. 612-13.** This delay of six years was based on the repeated filing of motions for receiver and other obstacles by the minority co-tenant designed to block the partition, and is itself unconscionable. **See L.F. 257-74; 275-351; 353-67; 377-425; 445-457; 458-72; 508-22; 523-26; 527-539; 540-47; 584-604; 2nd Supp. L.F. 87-94; 95-101; 102-118, 119-145; 168-82.**

At bottom, Fredericks' new claim of "unclean hands" only arose because during the six

years that Carpenter waited for his statutorily guaranteed relief, Carpenter agreed to see if the property would sell as a package with the Broadway-Washington Associates property making a parcel of over 51,000 square feet. The owners never agreed on a sale price or terms with any prospective purchaser. Partition by sale was required, as both the trial court and the Court of Appeals determined. The judgment of the trial court as to the Partition Action should be affirmed.

ARGUMENT IN RESPONSE TO POINT RELIED ON II

The Trial Court Did Not Err In Rejecting Sangamon's And

Fredericks' Demands For A Receiver Because The Trial Court's Judgment Was Not Against The Weight Of The Evidence And Appellants Did Not Have A Meritorious Claim As To Which It Could Be An Ancillary Remedy.

This section of the instant Brief responds to the argument set forth under the heading of Appellant's Second Point Relied On. **See Appellant's Opening Brief at pp. 44 - 55.**

Standard of Review.

The standard of review this Court is to employ in considering Point II is the familiar framework of ***Murphy v. Carron*, 536 S.W.2d at 32.** The only ground appellants assert for reversal here is that the trial court erred in refusing to appoint a receiver because that decision is against the "weight of the evidence."

It is difficult to discern from appellants' Brief, but there were three separate occasions when Judge Shinn considered and refused to appoint receivers over various properties. Appellants do not separately state any facts purporting to demonstrate that the trial court's judgments in favor of respondents on Counts Five (Sangamon), Eleven (Sangamon derivative) and Sixteen (Fredericks' oral joint venture) and declining to appoint a receiver were against the weight of the evidence. **L.F. 606, 607, 609.** Instead, appellants rely upon their unproven allegations asserted below. **Opening Brief at 46-48.** In addition, they misrepresent a judicial order from a different trial court, **Opening Brief at 47**, and impermissibly combine and commingle distinct requests for a receiver asserted by Sangamon and by Fredericks into one amorphous request that was never lodged with the trial court. **Opening Brief at 44-55.**

A. Sangamon Did Not Prove A Cause Of Action To Support A Receiver.

Sangamon sought appointment of a receiver over BWA in its "stand alone" Count Five of the Second Amended Petition. **L.F. 38.** For its "stand alone" Count Eleven, Sangamon derivatively sought appointment of a receiver over BWA. **L.F. 62.** The appointment of a receiver is not the end point of litigation but is only a means to an end, an "auxiliary remedy." ***State ex rel. Pettibone v. Mulloy,* 52 S.W.2d 402 (Mo. 1932).** One who seeks a receiver must have a right sufficient to support a receiver. ***State ex rel. Kopke v. Mulloy,* 43 S.W.2d 806 (Mo. 1931) (owner of 30 shares out of 88,500 held insufficient interest to permit appointment of receiver).** Sangamon held 25% of BWA. It was not the Managing General Partner. Seventy-five percent of the benefit from the partnership was for the benefit of Carpenter 1985 and Edgar Carpenter. Appointment of a receiver requires a viable cause of action under some theory of relief. ***Price v. Banker's Trust Co.*, 178 S.W. 745 (Mo. 1915).** The trial court's rejection of every theory of liability claimed by Sangamon necessarily resolved its request for a receiver - - by Judge Shinn repeatedly and studiously rejecting all Sangamon's receiver requests. **12/21/99, TR64:7-15 (Judge Shinn: "We were hoping at least we could resolve it without a receiver because a receiver will just eat up more money...It doesn't gain us a great deal").**

Sangamon sought a receiver for the BWA partnership and its real estate. Sangamon also insisted, and still does, that the receiver would need to be empowered to sell the BWA property and to sell both parcels of land as a unit. As demonstrated above, the trial court

lacked authority to order a receiver over the partition property. Appointing a receiver to sell just the BWA property (the smaller parcel in the middle of the block) would not have yielded the highest return and would not have been consistent with the relief requested by Sangamon. Like the Court of Appeals, **Opinion at 14-15**, the trial court simply determined that there was no cause of action that would support appointment of a receiver.

Even if Sangamon had wanted a receiver just for the BWA partnership, there was no basis in the record for ordering a receiver and the cost of a receiver would have been a tremendous burden to the partnership. The trial court was acutely aware of this burden because it held numerous hearings on Sangamon's request for a receiver.

B. Fredericks Did Not Prove The Golden Gateway Venture Existed So The Court Properly Could Not Appoint A Receiver Over It.

Respondents note that in Count Sixteen of his pleadings Fredericks sought appointment of a receiver over the non-existent oral joint venture. **L.F. 85-87.** He did not seek appointment of a receiver over the tenancy in common per se. ***Id.*** Fredericks never challenged the trial court's rejection of his alleged oral joint venture. He cannot challenge the rejection of the receiver over this non-existent entity. Fredericks relied exclusively on cases dealing with receivers for partnerships. **Opening Brief at 48-50.** The legislature and this Court devised the partition sale method for terminating the tenancy in common relationship. The Court should affirm the judgment on Count Sixteen.

C. This Court Should Decline Appellants' Invitation to Create A

Category of Cases Requiring Mandatory Receiverships.

The Court of Appeals acknowledged and applied the foregoing analysis in rejecting the claim of error in Judge Shinn's refusal to appoint a receiver, concluding that the availability of the procedural remedy depended upon the trial court's resolution of the substantive claims. **Opinion at 14-15.** As those claims were resolved adversely to Sangamon and Fredericks, there could be no error in not appointing a receiver. ***Id.***

Now, appellants essentially propose that this Court re-write **Rule 68.02** to alter the discretionary "may" to the mandatory "shall," at least where the conduct of the party opposing receivership, in the estimation of the party seeking receivership, is particularly "egregious." While couched as a request for needed "guidance," **Opening Brief at 50-54**, this Court will no doubt recognize that what appellants really suggest is an artificial bright-line rule against which a trial court's exercise of discretion must be measured.

This Court, however, knows that the appointment of a receiver is an extraordinary equitable remedy. Courts must be cautious in granting this form of relief. **See, e.g., *State ex rel. Chemical Dynamics, Inc. v. Luten*, 581 S.W.2d 921, 923 (Mo. App., E.D., 1979); *Robinson v. Nick*, 136 S.W.2d 374, 385 (Mo. App., E.D., 1940).** It is a "great power" only to be exercised on the basis of clear proof of imminent danger of harm, loss, and destruction. ***Niedringhaus v. William F. Niedringhaus Investment Co.*, 46 S.W.2d 828, 826 (Mo. 1931).** Courts recognize that there is a significant risk that receivers do the parties more harm than good. ***Aviation Supply Corporation v. R.D.B.I. Aerospace, Inc.*, 999 F.2d 314, 316-317 (8th**

Cir. 1993).

For these reasons, this Court should not accept appellants' invitation to create a category of claims or cases in which the trial court has no discretion, but is obligated to appoint a receiver. **Rule 68.02** appropriately vests the courts with discretion in invoking this "great power." There is nothing in the facts of the instant appeal that would support taking such discretion away.

ARGUMENT IN RESPONSE TO POINT RELIED ON III

The Trial Court Did Not Err By Entering Judgment For Respondents On Appellant's Claims Of Breach Of Fiduciary Duty (Counts Three, Eight and Fifteen), Constructive Trust (Counts Ten and Nineteen) Or Conversion (Counts Nine and Eighteen) Because The Judgments Are Not Against The Weight Of The Evidence.

This section of the instant Brief responds to the argument set forth under the heading

of Appellants' Third Point Relied On. **See Opening Brief at pp. 56 - 66.**

***Standard of Review and Procedural Defect*.**

In their Third Point Relied On, appellants address seven separate claims against two separate defendants premised on very different legal theories. Each claim of breach of fiduciary duty, constructive trust, and conversion was tried to the court below, but each has different aspects on appeal. Appellants voluntarily waived their right to a jury trial on their conversion claims on the record in open court. **Vol. V, TR972:15-973:6.** The standard of review is as stated in ***Murphy v.Carron*,** but appellants assert only that the judgments are against the weight of the evidence.

"The phrase 'weight of the evidence' means its weight in probative value, not the quantity or amount of evidence." ***Nix v. Nix*, 862 S.W.2d 948 (Mo. App., S.D., 1993).** "The weight of the evidence is not determined by mathematics, rather, it depends on its effect in inducing belief." ***Id.*** This Court defers "to the trial court as the finder of fact in [its] determination as to whether there is substantial evidence." ***Venture Stores, Inc. v. Pacific Beach Co.*, 980 S.W.2d 176 (Mo. App., W.D., 1998).** When the differences in the testimony in a court-tried case are stark, the appellate courts give great deference to the better opportunity of the trial court to judge witness credibility. ***Clinton v. Staples*, S.W.2d 1 (Mo. App., S.D., 1967).**

As a preliminary matter, respondents note that appellants' argument under the Third Point Relied On consists primarily of a lengthy recitation of abstract legal principals that

relate to fiduciary relationships. **Opening Brief at 56-66.** Like the elegant quote Mr. Justice Cardozo authored while still a member of New York's highest court, **Opening Brief at 57 (quoting *Meinhard v. Salmon,* 164 N.E. 545, 546 (N.Y. 1928))**, these legal principles are absolutely correct articulations of the law that have absolutely nothing to do with the instant appeal unless appellants make some effort to relate them to the record before this Court and the trial court. Throughout the argument here, the Court will observe that appellants discuss their interpretation of the facts only a very few times. Even less frequent is any citation to the record. As such, this Court may disregard Point III in its entirety, as violative of **Rule 84.04(i)**. Neither this Court nor the respondents should be required to sein the voluminous record developed herein to determine if and where any support may be found for the occasional factual matter appellants deign to include herein.

Appellants conflate their separate appeals of seven distinct claims. Respondents will respond cliam-by-claim in order to aid the Court's analysis and consideration of these issues, in the event the Court determines to excuse the defects of appellants' Brief.

A. Sangamon Lacks Capacity To Sue Derivatively, And The Judgment In Favor Of Defendants On Sangamon's Derivative Claim For Conversion In Count Nine Is Not Against The Weight Of The Evidence.

A. 1. Sangamon Lacks Capacity To Sue Derivatively In Counts Eight, Nine And Ten.

In Counts Eight, Nine, and Ten, Sangamon purported to assert claims against defendants derivatively on behalf of Broadway-Washington Associates, Ltd., pursuant to **§359.571,**

RSMo.

A limited partner may bring an action in the right of a limited partnership to recover a judgment in its favor if general partners with authority to do so have refused to bring the action or if an effort to cause those general partners to bring the action is not likely to succeed. **L.F. 51, ¶120.** One of the conditions precedent to suing derivatively is that the plaintiff must "set forth with particularity the effort of the plaintiff to secure initiation of the action by a general partner or the reasons for not making an effort." **§359.591, RSMo.** Sangamon at all times alleged that it was both a general partner and a limited partner of BWA. **L.F. 13, ¶13.** It maintains that position on appeal. **Opening Brief at 11.** Respondents do not take issue with this description. Sangamon holds 99% of its partnership interest as a limited partner and 1% as a general partner. The Second Amended Petition contains no allegation of any unsuccessful effort that Sangamon made to cause a "general partner" to bring these claims. Such an allegation would not have been true for the simple reason that Sangamon WAS and IS a general partner. Sangamon could have sued for conversion and constructive trust in its own right and did sue for breach of fiduciary duty in Court Three as a general partner. **L.F. 47-50.**

Respondents raised the affirmative defense of lack of capacity to sue because this statute does not grant Sangamon standing to sue derivatively and Sangamon failed to fulfill the conditions precedent to suing derivatively. **L.F. 172, Fourteenth Defense; §359.571, RSMo.; Rule 55.13.** Once defendants raised this affirmative defense, Sangamon had the duty to prove that it had capacity as a limited partner to sue derivatively. **Rule 55.13.** Sangamon never attempted to meet that burden.

Respondents have not found a case in Missouri on point, but the law of Delaware, on which the Uniform Limited Partnership Act is based, is very clear that a limited partner that either does not make demand on the general partners or allege in the complaint why the requirement for such a demand should be excused lacks standing to sue derivatively. ***Litman v. Prudential-Bache Properties, Inc.*** **611 A.2d. 12 (Ch. Del. 1992) (Respondents' App. 13-18).** It makes no sense to abuse the statutory framework of a uniform law just to permit Sangamon to sue derivatively when it can sue as a general partner in its own name for injuries to the partnership and itself. As a matter of law, Sangamon is not entitled to relief under any set of facts that could be proved in support of these derivative claims.

A. 2. Judgment For Defendants On Sanagmon's Derivative Conversion Claim Is Not Against The Weight Of The Evidence.

Sangamon's entire argument in support of its allegation of error on Count Nine, conversion, is on two pages at **Opening Brief at 65-66**. The defendants in this derivative claim are Carpenter 1985, C-V, Carpenter, Carpenter Marital Community, GGBG, DuPage, St. Francis Associates, Fleishhacker Properties and Fleishhacker. **L.F. 51.** Sangamon mentions only decedent Carpenter in the brief. **Opening Brief at 65-66.** Sangamon's argument contains no citation to the record to support its allegation that the judgment against it on the conversion claim is against the weight of the evidence. ***Id.*** It is Sangamon's duty to provide record citations in support of its argument. ***Coleman v. Gilyard,*** **969 S.W.2d 271 274 (Mo. App., W.D., 1998).** This claim is not preserved for review. **Rule 84.04(i); *Henderson v.***

***Fields*, 68 S.W. 3d 455 (Mo. App., W.D., 2001) (not preserved if no page references)**.

Further, Sangamon's argument is at most directed to cash, not specific chattels. To apply the exception it contends is applicable, Sangamon would have no show that the money spent by Carpenter 1985 to pay BWA's debts to C-V was meant for some other purpose than payment of BWA's lawful debts. **See cases collected at Opening Brief at 65**. Sangamon does not allege the funds were intended for any purpose other than paying the lawful debts of the partnership.

The judgment on the issue of conversion should be affirmed.

B. The Judgments In Favor Of Respondents On Fredericks' Conversion, Breach Of Fiduciary Duty And Constructive Trust Claims Based On The Rejected "Golden Gateway Venture" Are Not Against The Weight Of The Evidence.

B. I. Judgment For Defendants On Fredericks' Conversion Claim In Count Eighteen Was Not Against The Weight Of The Evidence.

In Count Eighteen, Fredericks asserted a conversion claim against Carpenter, Golden Gateway, DuPage, St. Francis, Fleishhacker Properties, and Fleishhacker solely on the basis of the alleged oral joint venture, the "Golden Gateway Venture." **L.F. 92-98.** Respondents specifically denied the "formation or existence of a Golden Gateway Joint Venture." **Rule 55.14; L.F. 144, ¶31.** They also raised the affirmative defense that an oral joint venture as described by Fredericks would be void as violative of the Statute of Frauds. **L.F. 174**, **Twenty-**

Sixth Defense.

The trial court found that Fredericks failed to prove by clear and convincing evidence that the alleged oral joint venture existed, ***Grissum v. Reesman,* 505 S.W.2d 81 (Mo. 1974) (clear and convincing evidence of oral partnership required)**, based on the following evidence: there were no capitalizations; no registered agent; no partnership agreement; no certificate of limited partnership; no registration of fictitious name; no tax identification number; no tax returns; no K-1's; no shared profits; no joint bank accounts; no bank account at all; no partnership distributions; no shared expenses; and, no written indicia of any kind of a partnership. **7/15/98, TR601:19-615:16 (Fredericks); 4/15/99, TR9:8-9:(Judge Shinn: "Well there is no partnership that I found.")**. The Court then properly granted judgment in favor of these respondents on Fredericks' conversion claim, as well as all of his other claims based on the non-existent alleged oral joint venture. **L.F. 606-610 Final Judgment; Counts Thirteen (accounting) L.F. 68-74; Fourteen (injunction) L.F. 74-79; Fifteen (breach of fiduciary duty) L.F. 79-85; Sixteen (receiver) L.F. 85-87; Seventeen (removal of manager) L.F. 87-92; Count Eighteen (conversion) L.F. 92-98; and Nineteen (constructive trust) L.F. 98-101.**

Significantly, Fredericks does not challenge the Court's ruling that there was no oral joint venture. **Opening Brief, *passim.*** The trial court did not err in rejecting that argument and all claims based on it. If it had, Fredericks has waived his right complain by failing to appeal that predicate decision for each of his causes of action. This conclusion applies with equal force to the fiduciary duty, constructive trust, injunction, conversion, and removal of

manager claims asserted by Fredericks.

Fredericks makes only passing reference to the rejected oral joint venture in his Brief. **Opening Brief at 60-61 n. 11.** Instead, he presents his Count Eighteen as if it sought return of parking lot revenues to his IRA as the 10% tenant in common. ***Id.*** The trial court cannot be convicted of error for failing to grant judgment on a theory never pleaded.

Moreover, the unappealed final judgment in favor of Fredericks and against BWA in the judicially re-written Count Thirteen (**see ¶g., p.25, *supra***), deprives Fredericks of any claim of prejudice from the trial court's judgment against him on this conversion claim. He was awarded 10% of the parking revenues from the entity actually in possession of them, BWA, which Fredericks never sued on any theory. The judgment on Count Eighteen should be affirmed.

B. 2. Judgment For Defendants On Fredericks' Breach Of Fiduciary Duty Claim In Count Fifteen Is Not Against The Weight Of The Evidence.

Fredericks claimed breach of fiduciary duty by GGBC, DuPage, St. Francis, Fleishhacker Properties, Fleishhacker and Carpenter in his Count Fifteen. **L.F. 79-85. See ¶4, pp. 13-14, *supra***. This claim was based solely on non-existent "Golden Gateway Venture." Moreover, Fredericks mentions only Allan Carpenter in his brief on this aspect of the fiduciary duty claims. **Opening Brief at 56-60.** Even if the trial court had not rejected the alleged oral joint venture, Fredericks' cause of action against Carpenter died when Fredericks failed to substitute a defendant for decedent. **See ¶3, p. 13, *supra*.**

B. 3. Judgment For Defendants On Fredericks' Constructive Trust Claim In Count Nineteen Is Not Against The Weight Of The Evidence.

Fredericks claimed breach of constructive trust by GGBC, DuPage, St. Francis, Fleshhacker Properties, Fleishhacker and Carpenter in his Count Fifteen. **L.F. 79-85**. This claim was based solely on the non-existent "Golden Gateway Venture." **See ¶4, pp. 13-14, *supra*.** Moreover, Fredericks mentions only Allan Carpenter in his brief in addressing the constructive trust claim. **Opening Brief at 66**. Even if the court had not rejected the alleged oral joint venture, Fredericks' cause of action against Carpenter died when Fredericks failed to substitute a defendant for decedent. **See ¶3, p. 13, *supra***.

C. The Judgments For Respondents On Sangamon's Breach Of Fiduciary Duty And Constructive Trust Claims Are Not Against The Weight Of The Evidence.

Sangamon asserted a direct breach of fiduciary duty claim against Carpenter 1985 and C-V in Count Three. **L.F. 32-36**. Appellants make the unsupported statement that a claim of breach of fiduciary duty is a tort claim. **Opening Brief at 8.** Finding no authority to support this theory, respondents address the issue as the equitable claim they know it to be. **See ¶2, pp. 12-13, *supra***. As an equitable claim, this issue was tried to the court, not the jury. ***Murphy v. Carron,* 536 S.W.2d 30, 32 (Mo. 1976)**, governs review of these claims.

Sangamon's derivative claim for imposition of constructive trust in Count Ten was based on the same three factual allegations as the derivative conversion claim in Count Nine.

L.F. 59-60, ¶144. Sangamon again fails to cite to any record evidence that could support a judgment in its favor on these allegations. **Opening Brief at 66.** The trial court's judgments that no funds were converted (derivative Count Nine) and no fiduciary duties breached (Count Three and Eight) are dispositive of this claim.

Sangamon alludes to a variety of allegations in attempting to support its Point Relied On III. This Court's review, however, is based on the pleadings and the evidence submitted in support of the allegations contained in the pleadings.

The allegations of breach of fiduciary duty in Count Three (**L.F. 32-35**) on which the case was tried are contained exclusively in paragraph 76 (**L.F. 32-34**) (and repeated verbatim in paragraph 105 of the unauthorized derivative claim asserted in Count Eight (**L.F. 47-50**), as follows:

> 76. The Carpenter Family Partnership and Carpenter-Vulquartz have breached their fiduciary duties to Sangamon Associates by:
>
> 76. a. Their refusal to account to Sangamon Associates for the business affairs of Broadway-Washington Associates;

Sangamon did not appeal the adverse judgments on its two separate claims for accounting, Count One and Count Seven (derivative). Sangamon is precluded from basing a breach of fiduciary duty claim upon an alleged right to an accounting that the trial court determined adversely to Sangamon and which it does not appeal. Appellants, however, are bound by the findings of fact and conclusions of law embodied in those judgments by the doctrine of collateral estoppel. Collateral estoppel has four elements: (1) the issue decided

must be identical; (2) the prior litigation must have resulted in a final decision on the merits; (3) the party to be estopped must have been a party or in privity with a party to the prior adjudication, and (4) that party must have had a full and fair opportunity to litigate the issue in the prior suit. ***Galaxy Steel & Tube, Inc. v. Douglass Coal & Wrecking, Inc.*, 928 S.W.2d 420 (Mo. App., S.D., 1996)**. Sangamon is so bound here.

> 76. b. Their past and continuing refusal to produce and permit Sangamon Associates to inspect and copy the books and records of Broadway-Washington Associates;

Moreover, the evidence before the trial court was that (1) Sangamon never presented itself at Carpenter 1985's to inspect the records, **Vol. III, TR554:14-22**; (2) Beginning in April 1994, Sangamon was really asking the Managing General Partner to explain the books and records, not produce them for inspection, **Vol. III, TR554:7-11;** (3) The requests changed from requesting explanations to requesting an accounting when Sangamon filed this lawsuit. **Vol. III, TR551:23-553:15**. The "nine separate requests" on which Sangamon relies (without record citation) for this allegation were for an "accounting," not an inspection, did not all refer to BWA, and they occurred over a very short period of time. Again, when the trial court found in favor of Defendants on Count One (accounting), Count Four (breach of contract), and Count Seven (derivative accounting), it eliminated this factual basis for a breach of fiduciary duty. **<u>See</u> pp. 24-25, ¶¶a.,c.,e.** The judgment could not be against the weight of the evidence on the basis of **76.b**.

Within 30 days, Carpenter 1985 had offered to permit Sangamon to nominate a private

accounting firm to perform the accounting at Sangamon's expense because C-V was performing those services without current payment. **Vol. III, TR556:9-557:11**.

76. c. Their failure to maintain adequate books and records of the business activities of Broadway-Washington Associates, including general ledgers;

The BWA partnership agreement does not require the Managing General Partner to maintain "general ledgers or any particular form of records." **L.F. 207-235, 7/14/98, TR394:12-18 (Sangamon's expert Stevens: no general ledgers required by the Partnership Agreement.)** Sangamon never asked that general ledgers be maintained, even after it filed this litigation. The books and records were adequate to present the financial condition of the partnership accurately. Moreover, Sangamon did not appeal the trial court's judgment that Carpenter 1985 did not breach the partnership agreement by failing to keep and maintain a complete set of books and records accurately reflecting the business transactions of the partnership...." **Count Four, L.F. 37; L.F. 607, Final Judgment.** It cannot base a claim of breach of fiduciary duty on a fact found against it and not appealed.

76. d. Their refusal to provide information and documentation to Sangamon Associates about the proposed sale of the Broadway-Washington property;

The Partnership Agreement sets forth the duties of the Managing General Partner. **L.F. 207-235**. There is no requirement that the Managing General Partner provide information about only proposed transactions to the other partners. The BWA partnership agreement grants the Managing General Partner "exclusive control over the business of the Partnership, including the power to assign duties, to sign notes, deeds and contracts, and to assume

direction of all Partnership business operations." **L.F. 218, Partnership Agreement, Art. 5 §1.** ***Id.*** The restrictions on the Managing General Partner are contained in Article 5, §5. The Managing General Partner is not authorized to borrow funds from the partnership; to act in any contravention of the partnership agreement or the certificate of limited partnership, or do any act, which would make it impossible to carry on the ordinary business of the partnership. **L.F. 221.** Of course, "[s]uch a grant of plenary authority is always subject to the fiduciary objections of the general partner, who must deal prudently and honestly with the partnership and other partners[.]" ***Knopke v. Knopke,*** **837 S.W.2d 907 (Mo. App., W.D., 1992)**. The weight of the credible evidence at trial established that Carpenter 1985 not only disclosed the proposed purchase of the property by Surls to Sangamon but also asked Fredericks and his law firm, Sheppard Mullin, to draft the sales contract. **TR, Vol III 405:21-407:11.**

It was only after Fredericks and Sangamon made an unauthorized demand for $2.5 million from the sale proceeds in April 1994 (**TR23:10-25:2; TX27**), and he and his law firm submitted proposed sale contracts that contained (1) an unauthorized arbitration clause on April 19, 1994 to try to force a resolution of the demand for $2.5 million; and (2) named unauthorized "sellers," controlled by Fredericks that could have allowed Fredericks to support his claim for unauthorized $2.5 million for unproductive "development efforts" (**Vol. I., TR36:5, 7; 38:2-40:13**), that Carpenter began limiting Fredericks' access to sensitive information. **7/16/98: 839:1/25.** Fredericks and his law firm, Sheppard Mullin, withdrew from representation of Carpenter interests in a different matter because of the same conflicts on May 2, 1994, **Vol. III, TR514:6-515:14**. At trial, Fredericks denied making the $2.5

million demand. **Vol. I, 49: 7-151:9**; but several exhibits referred to it and Fredericks never denied making it at the time the exhibits were created and never denied it in writing. Under these circumstances, the Managing General Partner had a fiduciary duty to the partnership to prevent Sangamon/Fredericks' own self-dealing from interfering with partnership business. The buyer elected not to proceed, and there was no longer anything to disclose about the Surls sale.

> 76. e. Their paying significant sums of money from the gross revenues of Broadway-Washington Associates as putative distributions and other payments without the knowledge or consent of other general and limited partners of Broadway-Washington Associates and without leaving it adequate funds to pay its expenses, including its property taxes, and maintain the Broadway-Washington Property;

There simply was no evidence that distributions were made to any BWA partners or that there ever was any failure to pay BWA's property taxes. Sangamon does not even mention "failure to pay property taxes" as an alleged breach of fiduciary duty in its brief on appeal. The only reference to taxes is at **Opening Brief at 50, n.11**, where Sangamon refers to BWA's property taxes as having been paid.

The evidence relating to distributions of parking revenues was that Carpenter received distributions of the parking revenue for the former tenancy in common property beginning in 1988 in the amount of 63.53% of the revenues until 1991 when he sold 10% of that parcel to Fredericks' IRA. From that date thereafter, Carpenter took a distribution of only 57.19% of

the revenues from the former tenancy in common. Sangamon's brief, at first, accurately reports these facts at 50-51 but then mixes apples and oranges when it conflates Fredericks' complaints about not receiving distributions of 10% of the former tenancy in common revenues with Sangamon's complaints. The distributions of Fredericks' IRA are a separate issue from the alleged breach of fiduciary duty owed by Carpenter 1985 in BWA and will not be addressed here. The only significant fact as to the Carpenter 1985's fiduciary duty is that there is no evidence that Carpenter 1985 or Edgar Carpenter received partnership distributions at any time that Sangamon did not also receive a partnership distribution.

> 76. f. Their failure to pay expenses of Broadway-Washington Associates, including its property taxes;

There is no evidence that Carpenter 1985 failed to pay expenses of Broadway-Washington Associates, including property taxes, except the unpaid bills for rent, office services, and tax preparation that were owed to C-V and Sangamon does not want those paid- -ever. Sangamon does not argue differently in its brief or cite any record evidence on this issue.

> 76. g. Their falsifying billings to Broadway-Washington Associates for rent, office support and tax preparation services;

There is no evidence that any defendant falsified any billings. Sangamon makes no assertion that it presented such evidence at trial in its brief. **Opening Brief, *passim.*** Unsubstantiated allegations do not make the trial court's judgment "against the weight of the evidence." The bills are at **2nd Supp. L.F. 258-283**. The trial court admonished Sangamon's counsel for continuing to make this allegation without supporting evidence date. **Vol. III,**

TR407:8-408:16.

76. h. Their failure to secure reimbursement from Carpenter to Broadway-Washington Associates for Carpenter's personal expenses;

There is no evidence that defendants failed to secure reimbursement from Carpenter for his personal expenses. Sangamon mischaracterizes the trial court's judgment on this issue at pages 53-54 of his brief where it discusses the townhouse that BWA maintained in Kansas City. Sangamon suggests that the trial court found a breach of fiduciary duty for Carpenter 1985 having authorized the partnership to pay the entire townhouse costs, at paragraph 7 of the Final Judgment. **L.F. 620.** The Final Judgment makes no such finding. In the Final Judgment the trial court concluded only that part of the cost of the townhouse should be reimbursed to BWA by Carpenter 1985. **L.F. 621, ¶7; 120/21/99, 122:16-124:6**, **Judge Shinn: "Well, the townhouse is the - - it is not hidden. It is questionable whether it is a reasonable charge against the partnership...It is not the result of self-dealing...if at all are getting is revenue off the parking lot, is $1,000 a month for a townhouse a reasonable expense to be charged against that enterprise. I think probably not...the net would be a reasonable hotel, you know, what the reasonable charges, I guess, for a hotel would be."** The amount that Sangamon alleged was a personal expense of Carpenter for the BWA Townhouse was $119,531.00; the amount BWA paid for the townhouse that the court deemed excessive was $65,694.00. **L.F. 621, ¶7.** Sangamon is not prejudiced by that ruling and makes no claim of error.

Sangamon offered evidence regarding reimbursement of travel expenses for Carpenter

and suggests that Carpenter offered no evidence to explain why these undisclosed charges were fair to the partnership. **Opening Brief at 63-64.** The travel expenses paid for the Managing General Partner were disclosed in the cash basis annual tax returns, the only form of accounting ever used by this partnership before this litigation required a different form of accounting to accurately portray the partnership's finances. **TR 7/17/98, 970:18-971:19 (Callahan).** Carpenter 1985 was the Managing General Partner. The partnership agreement specifically provides that the expenses of the Managing General Partner will be reimbursed but not the other partners'. **L.F. 220-21, Art 5, §4.** Some of Sangamon's expenses were reimbursed in the first two years of the partnership but Sangamon was not entitled to reimbursement under the partnership agreement and that practice ceased in 1987. **Opening Brief at 63-64; 7/13/98, 151:19-23.** Defendants acknowledge that Fredericks testified at trial that he stopped submitting expense reimbursements pursuant to an alleged oral agreement with the Managing General Partner that they would both stop being reimbursed, and Carpenter 1985 did not stop. **Opening Brief at 63-64.** There was no evidence of an oral modification of the BWA partnership agreement to prohibit reimbursement of the Managing General Partner's travel expenses after 1987. Oral modifications require consideration to be enforceable. ***Bergman v. Bergman,* 740 S.W.2d 215 (Mo. App., E.D., 1987).**

Actions inconsistent with an alleged oral contract disprove it. ***Strumberg v. Mercantile Trust Co.*, 367 S.W.2d 535 (Mo. 1963).** There was simply no evidence to support this allegation, other than Fredericks' self-serving post-hoc testimony. **7/13/98, TR:149:2-5, Sangamon's expert Stevens on direct: "Did you find this memorialized in any written**

document, an agreement, a memo to the file, anything like that? A. I haven't." Fredericks had been so thoroughly discredited that the trial court did not believe yet another allegation of an oral agreement modifying a written partnership agreement. **12/21/99, TR107:21-111:J23 (Judge Shinn).** A trial court may decline to believe the testimony of any party. ***Southwestern Bell Tel. Co. v. Crown Ins. Co.*, 416 S.W.2d 705 (Mo. App., W.D., 1967).**

> 76. i. Their failure to inform Sangamon Associates of an additional inquiry from a potential buyer for all or portions of the Broadway-Washington Property;

Sangamon does not mention this alleged basis for the breach of fiduciary duty claim in its brief. **Opening Brief, *passim.*** Sangamon has waived this issue.

> 76. j. Their moving the offices of Broadway-Washington Associates without informing Sangamon Associates and changing the locks to the offices of Broadway-Washington Associates; and
>
> 76. k. Their failure to cooperate in the preparation and assertion of substantial legal claims against a party breaching legal obligations for the development and financing of the Broadway-Washington Property.

Sangamon does not mention these two grounds of its fiduciary duty claims in its brief. It has waived them.

While waiving its pleaded bases for its breach of fiduciary duty claim, Sangamon has added an entirely unpleaded issue related to the partnership's negotiation and liquidation of outstanding claims against the partnership. **Opening Brief at 44-46**, under "Evidence of Self-

Dealing." The trial court may not be convicted of error for failing to find breach of fiduciary duty on an unpleaded ground. ***Brandt,* 856 S.W.2d at 664.**

If the Court determines to consider this issue anyway, respondents offer the following facts, authorities and arguments.

BWA and Carpenter 1985 dismissed their counterclaim for judicial supervision of the winding up on April 15, 1999, in open court with Sangamon's consent. **TR, 3/19/99, 19:9-10.** Sangamon had filed an unsuccessful motion to dismiss the counterclaim on August 1, 1997, **2nd Supp., L.F. 19-56**, so there was no reason to believe Sangamon would oppose dismissal. One of the issues raised in that counterclaim was BWA's desire to comply with the Management Agreement and pay C-V's outstanding accrued bills for its office rent, office services and tax preparation. **L.F. 189, ¶50.**

Carpenter-Vulquartz then had William Manson file a Petition for Damages based on a breach of contract and *quantum meruit* for these very same expenses, Case No. 99-CV213763, filed July 21, 1999. **2nd Supp., L.F. 236-283.** BWA filed a general denial, **2nd Supp, L.F. 285-86**, but it had to take the same position in this new judicial proceeding that it took before Judge Shinn about these same expenses. **4/13/2000, TR44:20-23. (Judge Shinn: "I recall you attempting to amend your counterclaim to include the claims that were brought in Division B. Is that not true? A. (Smiley) That is true your honor.")** Solely to avoid waste of partnership assets in defending an action that would have required attempted repudiation of prior judicial admission, the Managing General Partner authorized a confession of judgment. **4/13/2000, TR44-24-53:20. 2nd Supp., L.F. 287-289.** The trial court (Division

13) entered judgment on the confessed judgment on August 18, 1999. **2nd Supp., L.F. 290-291.**

Sangamon moved, again in an unauthorized derivative action, to set aside the judgment and the trial court did set aside the judgment. Sangamon did not include a copy of the order in the Legal File or Appendix. That omission did not constrain Sangamon from representing the Order to this Court as if it contained factual findings on Sangamon's allegations. **Opening Brief at 45.** It did not. The trial court merely set aside the judgment.

This whole issue is irrelevant in light of Sangamon's confirmed judicial admission that the accruals were not before Judge Shinn after dismissal of the winding up counterclaim on April 15, 1999. **4/13/2000, TR53:21-22: (Judge Shinn: "Well, the winding up is not before the court, that is true.").**

The trial court's judgments on Sangamon's fiduciary duty claims are not against the weight of the evidence.

D. The Trial Court Did Not Err Because The Trial Court Properly Found No Breach Of Any Fiduciary Duty.

At bottom, appellants are only arguing that the weight of the evidence required a judgment in their favor and that the trial court's failure to find in their favor equates to a misapplication of the law. **L.F. 59-63.** Thus, their only true argument is that the judgments are against the weight of the evidence. **L.F. 30-31.**

Sangamon's argument however, requires this Court first to have ruled that the judgment below was against the weight of the evidence because it starts from the premise that the

challenged conduct was "self-dealing." **L.F. 59.** Sangmon's authorities have no application if the conduct is not "self-dealing." Carpenter 1985 had a contractual right to reimbursement of its Managing General Partner expenses. Carpenter-Vulquartz had a contractual right to payment for rent and services under Management Agreement. There is no self-dealing.

The fundamental and fatal weakness in appellants' position on the fiduciary claims is that the trial court was not obligated to and did not enter Findings of Fact and Conclusions of Law. This Court, therefore, must conclude that the trial court resolved all disputes in accordance with the judgment it reached. ***Weaks v. Rupp*, 966 S.W.2d 387, 392 (Mo. App., W.D., 1998).** The Court of Appeals concluded correctly that whatever might be said of the quality of the evidence alluded to by appellants, the record in this matter certainly contained sufficient evidence for the trial court to have reached the result it did. **Opinion at 11-14.** Indeed, as a matter of law, the record does not support Sangamon's argument that Carpenter 1985 engaged in self-dealing or that it had some burden of production that it failed to meet. ***Bakelite Co. v. Miller*, 372 S.W.2d 867 (Mo. 1963)** (if plaintiff's proof is not legally conclusive on elements of its claim, defendant need not present evidence but may rest on plaintiff's failure or proof).

The trial court's judgment should and must be affirmed.

CONCLUSION

The trial court correctly resolved the highly complex, extraordinarily prolonged, disputes among the parties to this appeal. Rather than reversal, the actions and decisions below merit this Court's commendation. In any event, appellants' efforts to show any material error on the part of the trial court are without merit or even substance. Therefore, the judgments below should and must be affirmed in all respects. Additionally, this Court should award respondents their attorneys fees, as required by statute.

Respectfully submitted,

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March 15, 2005